

ST 07-13

Tax Type: Sales Tax

Issue: Responsible Corporate Officer – Failure to File or Pay Tax

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

JIM DOE, as responsible
officer of Doe Automotive Group, Inc.,
Taxpayer

No . 00-ST-0000
IBT: 0000-0000
NPL: 0000-000-00-0

John E. White,
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Lester Ottenheimer, Ottenheimer, Treplinsky, & Rosenbloom, appeared for Jim Doe; George Foster, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis:

This matter arose when Jim Doe (taxpayer or Doe) protested a Notice of Penalty Liability the Illinois Department of Revenue (Department) issued to him as a responsible officer of Doe Automotive Group, Inc. (DOE). Notice of Penalty Liability (NPL) number 0000-000-00-0 assessed a penalty equal to DOE's unpaid Retailers' Occupation Tax (ROT) and Use Tax (UT) liabilities regarding the months of June through October 2001. The penalty was a personal liability penalty, issued pursuant to § 3-7 of Illinois' Uniform Penalty and Interest Act (UPIA).

Doe offered books and records into evidence, as well as the testimony of two witnesses. I have reviewed that evidence, and I am including in this recommendation findings of fact and conclusions of law. I recommend that the penalty be assessed as issued.

Findings of Fact:

1. DOE was a Anywhere corporation that operated a Daimler Chrysler dealership in

- Illinois. Taxpayer Ex. 1 (copy of Asset Purchase Agreement between DOE and XYZ Investment Group, Ltd., dated April 25, 2001 (Purchase Agreement)), pp. 1-5. As such, DOE was engaged in the business of selling new and used automobiles at retail, as well as selling related property and services. *Id.*; Hearing Transcript (Tr.), p. 10 (testimony of Jim Doe (Jim), taxpayer's son).
2. Doe was DOE's president and sole shareholder. Tr. pp. 19, 34 (Jim).
 3. In 1998, Jim became DOE's vice-president and general manager. Tr. p. 11 (Jim). Jim assumed general control of DOE's day-to-day operations in 1999, and actually exercised that general control over DOE's operations in 2001. Taxpayer Ex. 7; Tr. pp. 24, 30, 42-43 (Jim), 46-47 (testimony of Mr. Smith, DOE's controller in 2001).
 4. Jim authorized payments made by DOE, including tax payments. Tr. pp. 24-25 (Jim).
 5. At different times when Jim was DOE's general manager, Chrysler Financial Company, LLC (CFC), a company that provided financing to DOE, and one of DOE's creditors, would seek DOE's permission to have a CFC representative placed at DOE "for the sole purpose of protecting the new and used vehicle inventory and other collateral securing the indebtedness to CFC" Taxpayer Ex. 7 (copy of letter from DOE to CFC authorizing CFC's placement of such a representative at DOE); Tr. pp. 25-27, 37-40 (Jim). Jim referred to such a CFC representative as a "keeper." Tr. p. 25 (Jim).
 6. CFC placed a keeper at DOE in late March or early April 2001. Tr. pp. 25-26, 37-40 (Jim).

7. Once at DOE, CFC's keeper took the funds that DOE received from customers on a daily basis, and used such funds to reduce the debt DOE owed CFC. Tr. pp. 25, 28-29, 37-40 (Jim).
8. When CFC placed a keeper at DOE in late March or early April 2001, it also notified DOE that DOE would have to find a buyer for the business within 30 days, or that CFC would, in Jim's words, "close the store." Tr. p. 37 (Jim).
9. On April 25, 2001, DOE entered into a Purchase Agreement and Management Agreement with XYZ Investment Group, Ltd. (XYZ). Taxpayer Exs. 1, 2 (copy of Management Agreement between DOE and XYZ, dated April 25, 2001).
10. The subject of the Purchase Agreement was the anticipated sale of DOE's assets and business to XYZ, which sale was contingent upon Daimler Chrysler Motor Corporation's (DCMC's) approval of XYZ as a franchisee, as evidenced by the execution of a DCMC Dealer Agreement by and between DCMC and XYZ. Taxpayer Ex. 1, pp. 1-2 (recital clauses).
11. The subject of the Management Agreement was the parties' agreement that XYZ would operate DOE's dealership, as an independent contractor, pending the consummation of the Purchase Agreement, which was to take place on an agreed-upon Closing Date. Taxpayer Ex. 2, p. 1 (recital clauses); Taxpayer Ex. 1, ¶ 16 (describing, *inter alia*, Closing Date).
12. On May 1, 2001, XYZ commenced operations at DOE under the terms of the Management Agreement, with the parties' expectation that XYZ would be "responsible for all operating profits and losses after May 1st, 2001 and thereafter." Taxpayer Ex. 2, p. 1.

13. CFC's keeper remained in place at DOE when the parties commenced the Management Agreement. Tr. pp. 36-40 (Jim).

14. The Purchase Agreement contained the following two clauses dealing with taxes:

19. Seller's Representations and Warranties. Seller [DOE] hereby represents and warrants as follows:

(q) **Taxes.** All franchise fees, sales and use tax, income, real and personal property tax returns have been duly prepared and filed in a timely fashion and all taxes shown thereon have been paid by Seller or have been accrued on the books of Seller. All taxes, assessments, levies and other amounts which Seller is required by law to withhold or collect have been duly withheld and collected and either paid over to the proper governmental authorities or are held by Seller for such payment and appropriate returns filed. Seller has no knowledge of any statement or fact which could reasonably be anticipated to give rise to any deficiencies in the payment of taxes, assessments, withholdings or collections of the type referred to in this Paragraph. Seller files tax returns only in the state of Illinois and in no other state or municipality. All taxes, Federal, state and local, which have heretofore by their terms become payable by Seller or which have been assessed against Seller, or as to which, to the knowledge of Seller, a claim has been threatened, have been paid or provided for, except as otherwise stated herein. Seller shall escrow the sum of ten thousand dollars (\$10,000) of the monies paid at closing with an Escrow Agent mutually acceptable to Seller and Buyer [XYZ], until receipt of a sales tax clearance, withholding tax clearance, unemployment tax clearance and single business tax clearance, or proof of the reasonable satisfaction to Buyer's counsel that Seller has no liability for such taxes as of the Closing Date; upon terms contained in the Escrow Agreement attached hereto and incorporated by reference as Exhibit "I", further subject to Paragraph 22 herein. At least twenty (20) days prior to the Closing Date, Seller shall file a form NUC 542-A (Notice of Sale or Purchase of Business Assets) [with the] Illinois Department of Revenue Bulk Sales Section.

21. **Tax Escrow.**

(a) **Tax Escrow.** Pursuant to Paragraph 19(q), Seller

shall place in escrow ten thousand (\$10,000) dollars for the payment of all taxes, interest and penalties, due or to become due the State of Illinois from Seller through the Closing Date. Such amount will be held pursuant to an Escrow Agreement, in the form attached hereto and incorporated herein by reference as Exhibit “H”.

(b) **Filing of Final Tax Returns.** Seller shall endeavor to file all tax returns and make all payments and deposits for taxes, interest and penalties due or to be due through the Closing Date within one (1) year following the Closing Date.

(c) **Payment of Taxes.** In the event that Seller fails to discharge its obligations to pay those taxes, interest and penalties due or to be due the State of Illinois through the Closing Date and produce a certificate showing that such taxes, interest and penalties have been paid, then twelve (12) months after the Closing Date, Buyer may direct the Escrow Agents to pay all of the amount held in escrow to the Illinois Department of Treasury in payment of any taxes, interest and penalties which may be due or which may become due from the Seller to the State of Illinois.

(d) **Additional Obligations.** Any obligations provided in this Paragraph are in addition to any other obligation Seller may have pursuant to this Agreement.

Taxpayer Ex. 1, pp. 19-20, 24-25.

15. If notice was required, permitted, or desired to be given under the provisions of either or both of the Purchase and Management Agreements, notice to the Seller was to be sent to both Doe and to Jim at DOE. Taxpayer Ex. 1, pp. 27-28 (§ 25), Taxpayer Ex. 2, p. 5 (§ 18).
16. Jim negotiated the terms of the Purchase and Management Agreements on DOE’s behalf. Tr. pp. 14-16 (Jim).
17. Doe executed the Purchase and Management Agreements on DOE’s behalf. Taxpayer Exs. 1-2.
18. In 2001, Mr. Smith (Smith) was DOE’s controller and chief accountant. Tr. pp.

- 45-46 (Smith).
19. During 2001, Doe came into DOE daily, although he came in after the dealership opened, and he left earlier than its closing time. Tr. pp. 47, 51 (Smith). Doe communicated with Jim about DOE's corporate affairs approximately twice per month (Department Ex. 2 (DOE's responses to Department's Interrogatories, response to interrogatory no. 22)), and spoke to Jim every day that both came in to work. Tr. pp. 52-53 (Smith).
 20. When the parties executed the Management and Purchase Agreements, DOE was current with its Illinois tax liabilities. Taxpayer Ex. 1, pp. 19-20 (§ 19(q)); Department Ex. 1 (copy of NPL, reflecting months for which unpaid assessment were issued); Tr. pp. 13-14 (Jim).
 21. DOE agreed that it would remain liable to "pay out all sums due its employees for services rendered through the Closing Date on the Closing Date." Taxpayer Ex. 1, p. 11 (§ 13).
 22. In early June 2001, XYZ notified DOE that DCMC rejected its original application to be accepted as a DCMC franchisee. Tr. p. 18 (Jim). Thereafter, XYZ submitted another application to DCMC. Tr. p. 19 (Jim).
 23. During a meeting held in early August 2001, at Chrysler's zone office, DCMC notified DOE and XYZ that it was rejecting XYZ's franchise application. Tr. pp. 19, 22. Jim and Doe attended that meeting, as did representatives of XYZ. *Id.*
 24. DOE did not file returns on which it reported the amounts of its total and taxable gross receipts it realized during the months of May through August, 2001. *See* Department Ex. 1. Those returns were due to be filed in the months of June

- through September, 2001. *Id.*; 35 **ILCS** 120/4.
25. Additionally, DOE failed to timely file two transaction-by-transaction returns, regarding two vehicles it sold sometime during those months. Department Ex. 1, p. 2.
 26. On August 8, 2001, DOE filed for bankruptcy. Taxpayer Ex. 3, p. 9; Tr. pp. 19-20 (Jim).
 27. As part of that bankruptcy petition, DOE sought to vacate the Purchase and Management Agreements with XYZ. Taxpayer Exs. 3-4 (respectively, copies of Debtor's [DOE's] Application to Reject Asset Purchase Agreement, and order granting that motion), 5-6 (respectively, copies of Debtor's [DOE's] Application to Reject Management Agreement, and order granting that motion).
 28. DOE closed its doors and ceased doing business in early September 2001. Tr. p. 28 (Jim); *see also* Taxpayer Exs. 3-4.
 29. During a prior contested case within the Department's Office of Administrative Hearings, the Department determined that Jim was liable for the same penalty at issue here, and that he was also liable for other unpaid tax liabilities of DOE. Tr. pp. 42-43 (Jim).
 30. In 2001, Doe had been diagnosed with Parkinson's disease. *See* Taxpayer Ex. 8 (report titled, "Neuropsychological Evaluation," by Leonard Koziol, Ph.D.; Tr. pp. 12, 29 (Jim).

Conclusions of Law:

Section 3 of the Illinois Retailers' Occupation Tax Act (ROTA) requires retailers to file monthly returns on which they report the amounts of the total and taxable gross receipts they realized during a prior month, and to also pay the amount of tax imposed on such taxable gross receipts, for the privilege of selling tangible personal property at retail. 35 **ILCS** 120/3. Illinois retailers of automobiles have the further responsibility to report, on an individual transaction basis, the total and taxable gross receipts they receive from each retail sale of a motor vehicle. *Id.* Illinois also has a Use Tax Act (UTA), which imposes a tax on the privilege of using tangible personal property purchased at retail for use or consumption in Illinois, which tax is assessed at the same rate as the tax imposed on retailers. 35 **ILCS** 105/3, 3-10. The UTA imposes upon retailers the duty to act as the collector of use tax from a purchaser (35 **ILCS** 105/3a, 3-45), and to turn over such collected tax monies to the Department. 35 **ILCS** 105/8. The tax that a retailer is required to collect from a purchaser, and then turn over to the state, is a trust tax. 35 **ILCS** 735/3-7(f).

The NPL reflects that, during the months of June through August 2001, DOE failed to file returns to report the amounts of total and taxable gross receipts it realized from selling tangible personal property at retail. Department Ex. 1. After determining that such returns were not filed, the Department used the best available information to determine what DOE's taxable receipts and resulting tax liabilities were for the months at issue, and it then issued assessments to DOE. *Id.* At hearing, Jim testified that he has already been found to be liable for DOE's unpaid taxes for the period at issue. Tr. pp. 42-43 (Jim). As of the date of this hearing, however, DOE's tax liabilities remained unpaid.

See Department Ex. 1. This matter involves the Department's determination that Doe also owes a personal liability penalty, in the amount of DOE's unpaid taxes, pursuant to UPIA § 3-7.

When the Department introduced the NPL into evidence under the certificate of the Director, it presented prima facie proof that Doe was personally responsible for DOE's unpaid tax liabilities. 35 ILCS 735/3-7; Branson v. Department of Revenue, 68 Ill. 2d 247, 260, 659 N.E.2d 961, 968 (1995) ("by operation of the statute, proof of the correctness of such penalty, including the willfulness element, is established by the Department's penalty assessment and certified record relating thereto."). The Department's prima facie case is a rebuttable presumption. Branson, 168 Ill. 2d at 262, 659 N.E.2d at 968. After the Department introduces its prima facie case, the burden shifts to the taxpayer to establish that one or more of the elements of the penalty are lacking. *Id.*

Section 3-7 of the UPIA provides:

Any officer or employee of any taxpayer subject to the provisions of a tax Act administered by the Department who has the control, supervision or responsibility of filing returns and making payment of any trust tax imposed in accordance with that Act and who willfully fails to file the return or make the payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the taxpayer including interest and penalties thereon.

35 ILCS 735/3-7. Basically, there are two separate inquiries under this provision. The first is whether an individual was a responsible officer or employee for a corporation for a particular period of time. If the answer to the first question is yes, the second inquiry is whether the responsible officer/employee acted willfully. Branson, 68 Ill. 2d at 367-68,

659 N.E.2d at 971; McLean v. Department of Revenue, 326 Ill. App. 3d 667, 674-65, 761 N.E.2d 226, 234 (1st Dist. 2001).

Doe asserts that he was not a responsible officer of DOE during the months the tax liabilities arose, since he was not involved in DOE's day-to-day management at that time. Tr. pp. 60-62 (closing argument). Since he was not a responsible officer then, Doe continues, he could not have willfully failed to pay any of the tax at issue. *Id.*, p. 61. He argues further that he did not act willfully because either CFC or XYZ must be deemed to have been in control of DOE during the liability period. Tr. pp. 61-62. Doe points out that there is not even any evidence in the record to suggest that he knew of the tax liabilities when they were accruing. Tr. pp. 61, 63.

The Department responds that the evidence shows that Doe was a responsible officer of DOE even though Jim might have handled its day-to-day operations. This is because Doe remained president and sole shareholder of the corporation, and was present at DOE for several hours, each working day, during the months at issue. Tr. pp. 63-65 (closing argument). DOE also had check signing authority during that time. The Department notes that Doe concedes that he discussed DOE's corporate affairs with Jim at least twice a month, during the months at issue. Department Ex. 2. Perhaps most importantly, the Department points out that Doe was the officer who actually signed the Management and Purchase Agreements, which gave managerial control of DOE to XYZ. Tr. pp. 65-66.

The Department also rejects Doe's argument that either XYZ or CFC should be deemed to be the person(s) that willfully failed to file returns or pay taxes during the months at issue. The Department stresses that the Purchase Agreement, itself, reflects

that DOE retained the primary obligations for filing returns and paying taxes owed regarding the operations of DOE's business. Tr. pp. 68-69. The Department also cites to Illinois and federal case law for the proposition that, while a responsible officer may delegate to others the jobs of filing tax returns and paying taxes, he may not avoid personal liability by turning a blind eye to whether those tasks are actually completed, when there is reason to believe that such tasks might not be performed. Tr. pp. 70-72.

The first issue is whether Doe was a responsible officer of DOE. Section 3-7 describes a responsible officer as "[a]ny officer or employee of any corporation ... who has the control, supervision or responsibility of filing returns and making payment of ... the tax[es] ... imposed." For the past forty years, when the Illinois Supreme Court has been asked to construe terms the Illinois General Assembly used in the UPIA's statutory predecessors, it has looked to federal decisions in which courts have been asked to interpret similar terms used in § 6672 of the Internal Revenue Code (Code or IRC). Branson, 68 Ill. 2d at 254-55, 659 N.E.2d at 965; Department of Revenue v. Heartland Investments, Inc., 106 Ill. 2d 19, 29-30, 476 N.E.2d 413, 417-18 (1985); Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill. 2d 568, 575, 369 N.E.2d 1279, 1283 (1977). On the question of who is a responsible person for purposes of Code § 6672, "[a]ll courts agree ... that 'responsibility is a matter of status, duty, and authority.' " Purcell v. United States, 1 F.3d 932, 937 (9th Cir. 1993) (*quoting* Davis v. United States, 961 F.2d 867, 873 (9th Cir. 1992)).

In Ghandour v. United States, 36 Fed. Cl. 53 (1996), the federal court of claims provides a good description of these constituent components of responsibility:

1. *Status*

An individual's status is to be determined by

reference to such things as his title or position within the corporate structure (*e.g.*, an officer or director), as well as his ownership stake in the employer corporation. *Sale* [*v. United States*, 31 Fed.Cl. 726 (1994)], at 731 (“As president, treasurer, chairman of the board, and majority shareholder, plaintiff’s status at [the corporation] was undeniable.”); *Hammon* [*v. United States*, 21 Cl.Ct. 14 (1990)], at 24-25 (plaintiff who was president, majority stockholder, and director of two employer corporations had sufficient status to be found responsible as to each under I.R.C. § 6672). However, the holding of corporate office alone is not sufficient to trigger liability under I.R.C. § 6672(a). In this connection, the Federal Circuit held in *Godfrey* [*v. United States*, 748 F.2d 1568 (Fed.Cir.1984)]:

The Claims Court effectively held that Godfrey’s *status* as chairman cum advisor-negotiator-and the respect and deference accorded that status-amounted to “ultimate authority” or “power to control” for purposes of § 6672.

The case law will not support that holding.

It is material, but not controlling

748 F.2d at 1575. Conversely, the absence of any official corporate title will not suffice to remove liability. *See Whiteside* [*v. United States*, 26 Cl.Ct. 564 (1992)], at 568-73 (plaintiff who held no official corporate title, but was listed on bank signatory cards as “Vice President” and exercised significant financial oversight and management, was a responsible person). Accordingly, a party’s status is but one factor bearing on the ultimate issue, *i.e.*, whether the individual had the “power to control” the finances of the employer such that he could have avoided the default.

2. Duty

Next, the finder of fact must examine a person’s duties within the employer organization to determine whether he was a responsible person under I.R.C. § 6672. “[A] person’s ‘duty’ under § 6672 must be viewed in light of his power to compel or prohibit the allocation of corporate funds.” *Godfrey*, 748 F.2d at 1576. In this connection, a person’s duties are to be evaluated in terms of those affairs of the corporation over which that individual had responsibility, *i.e.*, the job description. For instance, duty may be determined by reference to corporate by-laws and resolutions, *Hammon*, 21 Cl.Ct. at 25, or to the duties actually performed by an individual in the course of business. *See, e.g., Sale*, 31 Fed.Cl. at 731; *Whiteside*, 26 Cl.Ct. at 571-72. Ultimately, the crucial inquiry is whether a person had a duty to oversee, manage, or administer the

financial affairs of the company, specifically with reference to the paying of creditors and taxes.

3. Authority

Finally, a person's authority within the corporation is highly relevant in ascertaining whether an individual was a responsible person for the purposes of I.R.C. § 6672. In this connection, the Federal Circuit noted that-

where a person has authority to sign the checks of the corporation, or to prevent their issuance by denying a necessary signature, or where that person controls the disbursement of the payroll, or controls the voting stock of the corporation, he will generally be held "responsible."

Godfrey, 748 F.2d at 1576. The focus here is on "actual authority," i.e., substance as opposed to form. *Hammon*, 21 Cl.Ct. at 26. See also *Whiteside*, 26 Cl.Ct. at 573. Among the indicia of authority which have been found by the courts to be noteworthy are the powers to vote significant blocks of stock, sign checks, hire and fire employees, control employees' pay, enter contracts on behalf of the corporation, make decisions regarding the finances of the corporation, and prepare corporate tax strategies. See *White [v. United States]*, 372 F.2d 513, 516 (Ct.Cl. 1967)], at 520; *Sale*, 31 Fed.Cl. at 731-32; *Whiteside*, 26 Cl.Ct. at 573; *Sulger v. United States*, 24 Cl.Ct. 535, 538 (1991); *Hammon*, 21 Cl.Ct. at 26. Again, the ultimate question is whether, in combination with his status and duty, an individual had sufficient authority within the employer company to prevent the default on the corporation's withholding tax obligations.

Ghandour, 36 Fed. Cl. at 60-61.

Both counsel agree that Jim generally handled DOE's day-to-day operations during the period at issue (Tr. pp. 61, 64), but they differ as to the effect of that conclusion. The Department contends that since Doe (1) remained DOE's president and sole shareholder, (2) retained check-signing authority, and (3) was physically present and working at DOE every day during the applicable period, he was and remained a responsible officer of DOE. Doe, on the other hand, asserts that since Jim generally handled DOE's day-to-day operations, he could not have been a responsible officer of

DOE.

I first note that Doe's argument has been rejected by federal courts. For example, in Purcell, the court noted:

That an individual's day-to-day function in a given enterprise is unconnected to financial decision making or tax matters is irrelevant where that individual has the authority to pay or to order the payment of delinquent taxes. *See Denbo v. United States*, 988 F.2d 1029, 1033 (10th Cir.1993) (although "it was Allred ... who controlled the day-to-day operations of the corporation and made decisions concerning the payment of creditors and disbursement of funds," Denbo remained responsible because "[h]is financial involvement in the corporation, along with his check-signing authority, gave him the effective power to see to it that the taxes were paid"); *Bowlen*, 956 F.2d at 728 (even after "Briggs took over the day-to-day operations of" the corporation, "[t]he Bowlens remained responsible persons" because "they held sufficient control ... to ensure that other creditors were not preferred while the back taxes remained unpaid"); *McDermitt v. United States*, 954 F.2d 1245, 1251 (6th Cir. 1992) ("[a]lthough not an officer of the corporation, plaintiff was" responsible because "[h]e had the power and the authority to direct the payment and non-payment of the corporation's liabilities").

Purcell, 1 F.3d at 937.

Under the particular facts of this case, I also reject Doe's argument that he was not a responsible officer of DOE during the periods when DOE failed to file returns and pay its Illinois taxes. The best evidence of Doe's responsible officer status lies in the fact that he signed the Purchase and Management Agreements, and in the express terms of those contracts. When Doe signed the Purchase Agreement, he agreed that DOE would "... place in escrow ten thousand (\$10,000) dollars for the payment of all taxes, interest and penalties, due or to become due the State of Illinois from [DOE] *through the Closing Date*", and he also agreed that DOE would "...endeavor to file all tax returns and make

all payments and deposits for taxes, interest and penalties due or to be due *through the Closing Date* within one year following the Closing Date.” Taxpayer Ex. 1, p. 24, ¶ 21(a)-(b) (emphases added). Doe signed that agreement as DOE’s president and sole shareholder. *Id.*, pp. 16 (¶ 18(d)), 30. Doe, therefore, had actual, personal knowledge of what DOE’s obligations were during the period when Doe allowed XYZ to manage DOE’s business as an independent contractor — not just under Illinois law (35 ILCS 120/3), but also under the express terms of the contract he signed. He also exercised actual authority and control over DOE’s reporting and payment obligations by signing the agreement that expressed such obligations. Taxpayer Ex. 1. In sum, Doe retained his status as the ultimate responsible officer of DOE, since he was still DOE’s president and sole shareholder during the months at issue. He also performed fundamentally important duties and exercised actual control over DOE’s business, when he signed the agreements with XYZ, and granted that entity the right to manage DOE’s business. Taxpayer Exs. 1-2; Ghandour, 36 Fed. Cl. at 60-61.

At best, Doe’s knowing, conscious decision to allow XYZ to enter DOE’s premises and run the day-to-day operations of the business as a prospective new purchaser, constituted Doe’s delegation, to XYZ, of the same duties that he had previously delegated to his son, Jim. When a person has and/or actually exercises the power to delegate to different individuals the jobs of filing a corporation’s tax returns and paying taxes, the person making the delegation is manifesting his status as a responsible officer. *See Branson*, 68 Ill. 2d at 267, 659 N.E.2d at 971 (“we do not intend to imply that a corporate officer who is responsible for filing retailers’ occupation tax returns and remitting the collected taxes may avoid personal liability under section 13½ merely by

delegating bookkeeping duties to third parties and failing to inspect corporate records or otherwise failing to keep informed of the status of the retailers' occupation tax returns and payments.”). Similarly, in Ghandour, the court noted:

Frequently, a party will attempt to negate the inference that he was a “responsible person” under § 6672(a) by demonstrating that the responsibilities and duties over the collecting, truthfully accounting for, and paying over of the taxes was delegated to another individual. The courts, however, have resisted this line of argument. *See United States v. McCombs*, 30 F.3d 310, 320 (2nd Cir.1994); *Sulger*, 24 Cl.Ct. at 538-39. This rejection is due to a recognition that, even where an individual delegates significant responsibilities to others, he still retains final authority and oversight responsibility over his subordinates. *** Accordingly, it is not sufficient that a party point to *another* “responsible person,” as more than one individual may be found to have been a “responsible person” within an employer company. *Gephart*, 818 F.2d at 473; *Godfrey*, 748 F.2d at 1574-75; *Scott v. United States*, 354 F.2d 292, 296 (Ct.Cl.1965); *Hammon*, 21 Cl.Ct. at 24. Rather, in order to avoid liability, an individual must show that he was completely divested of the power to see to it that the taxes were paid.

Ghandour, 36 Fed. Cl. at 61-62.

Here, immediately before the periods at issue, Doe personally signed a contract that expressly obliged DOE to “endeavor to file all tax returns and make all payments and deposits for taxes, interest and penalties due or to be due *through the Closing Date ...*”, yet he now claims that he should not be considered responsible for seeing to it that DOE file those very same returns. *See* Tr. p. 61. The documentary evidence rebuts Doe’s argument, and confirms that Doe was a responsible officer of DOE during the periods when Doe allowed XYZ to manage DOE’s business.

The next issue is willfulness. The Illinois Supreme Court has defined a willful failure as involving “intentional, knowing and voluntary acts or, alternatively, reckless

disregard for obvious or known risks.” Heartland Investments, Inc., 106 Ill. 2d at 29, 476 N.E.2d at 418. Here, there are two voluntary, knowing, and intentional acts that reflect Doe’s willfulness. The first is DOE’s consent to CFC’s request to place a keeper at DOE, and the second is Doe’s execution of the Purchase and Management Agreements with XYZ. Just before Doe signed the agreements with XYZ, he and Jim were notified that CFC was seeking DOE’s permission to place a keeper at the business to secure CFC’s security interests. Tr. pp. 25-26, 28-29, 37-40 (Jim). Before either of those events occurred, DOE was current with its tax payments. Taxpayer Ex. 1, pp. 19-20, ¶ 18(q); Tr. p. 13 (Jim). It was only after DOE allowed CFC to place a keeper at DOE, and after Doe signed the agreements with XYZ, that DOE stopped filing its Illinois sales and use tax returns, and also stopped paying the taxes required to be shown due on those returns. Department Ex. 1. I consider each of these separate acts in turn.

In order to keep its doors open, DOE permitted CFC to come in and take DOE’s receivables while DOE continued to sell property and services to customers at retail. Taxpayer Ex. 7; Tr. pp. 25, 28-29, 37-40 (Jim). While Jim personally signed CFC’s consent letter (Taxpayer Ex. 7), there was no evidence offered to suggest that Doe did not know about and permit Jim to sign that document. DOEer was present every day at DOE, and he regularly discussed corporate business with Jim. Department Ex. 2; Tr. pp. 52-53 (Smith). And given the potentially business ending nature of CFC’s request that it be allowed to place a keeper at DOE — since, as Jim explained at hearing, if CFC’s request was refused, CFC would cancel DOE’s credit and close DOE’s doors (*see* Tr. pp. 26, 28-29, 37) — I reject even the suggestion that Doe was not aware of, or that he did not permit, DOE’s consent to CFC’s request. By keeping DOE’s doors open, moreover, Doe,

DOE's sole shareholder, was able to try to find a prospective buyer and realize some equity from the business he had spent years developing and operating. *See* Taxpayer Ex. 1, p. 9 ¶ 6 (Sale of Trade Name, Goodwill and Supplies) ("Buyer shall pay Seller the sum of two million two hundred fifty thousand dollars (\$2,250,000) for Seller's Chrysler and Jeep franchises. ***"). Further, Doe personally signed the agreements that would seem to have satisfied CFC's second requirement for allowing DOE to keep its doors open and stay in business — that DOE find a potential buyer within 30 days from the date CFC placed its keeper at DOE. Tr. p. 37 (Jim). That fact constitutes strong, circumstantial evidence that Doe knowingly allowed CFC to begin to take DOE's receivables in either late March or early April, 2001. Taxpayer Ex. 7; Tr. pp. 25-26, 28-29, 37-40 (Jim).

Again, the decision to allow CFC to place its keeper at DOE allowed DOE to keep its doors open, and it also meant that DOE would be able to continue to make taxable sales of goods and services to customers at retail. But another effect of Doe's deal is also clear. Because CFC's keeper was taking DOE's receivables as those funds came in the door, DOE did not have available the funds it had previously used to pay its Illinois tax liabilities, as well as its other creditors. Tr. pp. 25-26, 28-29, 37-40 (Jim). Thus, I consider Doe's agreement to have CFC take DOE's receivables as constituting Doe's knowing and voluntary act of preferring one creditor, CFC, over all of DOE's other creditors, including the agency to whom DOE was responsible for reporting, and making payments of, DOE's Illinois tax liabilities. Knowingly preferring other creditors over the Department constitutes a willful failure to pay a ROT liability. Heartland Investments, Inc., 106 Ill. 2d at 30-31, 476 N.E.2d at 418; Estate of Young v. Department of Revenue, 316 Ill. App. 3d 366, 378, 734 N.E.2d 945, 953 (1st Dist. 2000).

I also consider Doe's execution of the Purchase and Management Agreements, and his subsequent failure to investigate whether DOE was complying with its obligations pursuant to those agreements, to constitute his reckless disregard of the obvious risk that DOE would not, under the circumstances, be able to pay its ongoing Illinois tax obligations. During closing argument, Doe claimed that there is no evidence that he even knew that XYZ was not filing DOE's monthly returns until early August 2001, when DCMC rejected XYZ as a potential franchisee. Tr. p. 61. The Illinois Supreme Court, however, has held that "lack of willfulness is not proved simply by denying conscious awareness of a tax deficiency that could have been easily investigated by an inspection of corporate records." Branson, 68 Ill. 2d at 268, 659 N.E.2d at 971.

Doe was physically present at DOE every day during the months when XYZ was not filing DOE's returns. Tr. pp. 47, 51-53 (Smith). Doe, therefore, had the actual ability to personally review DOE's records to see whether those returns were being filed. Those records, moreover, remained DOE's records until the Closing Date (Taxpayer Ex. 1, p. 10, ¶ 9), just as Doe remained DOE's president and sole shareholder. There is no evidence that Doe ever sought to inspect DOE's records during the period at issue, and Doe is simply wrong when he argues that "XYZ ... had total assumption and control over the dealership from the period of May 2001 until early August of 2001." Tr. p. 61. By its clear terms, the Purchase Agreement Doe signed obliged *DOE* to endeavor to file tax returns due through the Closing Date (Taxpayer Ex. 1, pp. 24-25, ¶ 21), yet there is no evidence that Doe did anything to satisfy that obligation for DOE. By failing to inspect DOE's records to discern whether DOE was meeting its statutory and contractual obligations to file tax returns and make tax payments, Doe recklessly disregarded the

known risk that DOE was not satisfying those obligations. Branson, 68 Ill. 2d at 268, 659 N.E.2d at 971.

Conclusion:

For the reasons stated above, I recommend that the Director finalize NPL No. 0000-000-00-0 as issued, with interest to accrue pursuant to statute.

Date: 5/23/2007

John E. White
Administrative Law Judge